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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [redacted]. 1911

No. [redacted] 227

THE UNITED STATES, APPELLANT,

vs.

COLORADO ANTHRACITE COMPANY.

APPEAL FROM THE COURT OF CLAIMS.

FILED MARCH 10, 1910.

(22058)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1910.

No. 470.

THE UNITED STATES, APPELLANT,

vs.

COLORADO ANTHRACITE COMPANY.

APPEAL FROM THE COURT OF CLAIMS.

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1 In the Court of Claims.

COLORADO ANTHRACITE COMPANY, A CORPORATION,
v.
THE UNITED STATES. } No. 28904.

I.—*Petition. Filed March 16, 1906.*

The petition of the Colorado Anthracite Company, a corporation incorporated under the laws of the State of Colorado whose post-office address is the city of Philadelphia, in the State of Pennsylvania, respectfuly represents that upon the 24th day of December, 1883, the petitioner made coal entry No. 13, Gunnison, Colo., of the SE. ¼ of the NW. ¼ and the NW. ¼ of the SE. ¼ and the W. ½ of the NE. ¼, sec. 17, Tp. 13 S., R. 86 W., 6 P. M., Colorado, containing 160 acres, in the name of Edward G. Stoiber, and on the same day the petitioner paid the register and receiver at Gunnison the sum of $3,200 in full payment for the said land. Petitioner further states that several years previous to the said entry Edward G. Stoiber had discovered coal upon the said land, and on August 31, 1882, had filed a coal declaratory statement for the said land under section 2349 of the R. S. of U. S., and that the said Edward G. Stoiber had conveyed the said land to Henry E. Rood by deed dated January 15, 1882, and that the said Henry E. Rood had conveyed the said land to Wm. S. Divine, and that the said Wm. S. Divine had conveyed the land to petitioner by deed dated February 15, 1882, and that from the

2 15th day of February, 1882, petitioner was the party interested in the claim to the said land arising from the discovery of coal upon the said land by the said Edward G. Stoiber.

The petition further states that it was considered proper and necessary that the said land should be entered in the name of the said Edward G. Stoiber and not in the name of the petitioner because of the fact that the claim to the land had originated with the said Edward G. Stoiber.

Petitioner further states that the right to enter the said land was contested prior to the allowance of the said entry by Elisha A. Buck and G. T. W. Patrick, who had also filed coal declaratory statements for the said land and that because of the said conflicting rights a hearing was had, prior to the allowance of the said entry, to determine the right to make the said entry; that at the said hearing evidence was taken and the witnesses and the agents of the petitioner testified that the petitioner was the party in interest in making the said entry and that the said Stoiber had bargained and sold and agreed to transfer all his right, title, and interest in the said land to

the petitioner and none of the witnesses of the petitioner at this hearing denied or concealed the fact that the said Stoiber had deeded the land and that the said entry was being made in the interest of the petitioner as assignee of the rights of the said Stoiber. Petitioner further states that notwithstanding the said evidence, the register and receiver at Gunnison, Colo., were of the opinion that petitioner was entitled to make entry for the said land and allowed the petitioner to make the entry for the said land upon December 24, 1883, and upon December 28, 1883, the said register and receiver formally decided that the said entry could be made in the name of Edward G. Stoiber.

3 The petitioner further states that Elisha A. Buck and G. T. W. Patrick, who were contesting the right to make the said entry, appealed from the decision of the register and receiver, and the Commissioner of the *the* General Land Office on February 1, 1887, upon the same evidence which had been given before the register and receiver, held that the said entry should be canceled, and upon appeal, the Secretary of the Interior on July 31, 1888, affirmed the decision of the Commissioner of the General Land Office and the entry was thereupon canceled.

The petitioner further states that the said entry was erroneously allowed and could not be confirmed for the reason that it was allowed upon evidence and proof which showed that it should not have been allowed, as was afterwards held by the Commissioner of the General Land Office and the Secretary of the Interior, and for the reason that it was allowed pending a contest to determine the right to make the said entry and for the further reason that it was allowed on December 24, 1883, which was four days prior to the decision of the register and receiver holding that the said entry could be allowed.

Petitioner further states that by virtue of the deeds made by the said Edward G. Stoiber and his grantees by which the title of the said Edward G. Stoiber became vested in the petitioner and by virtue of the fact that the petitioner was the party in interest and actually furnished the money with which the payment of $3,200 was made, the petitioner is the party who made the said entry within the meaning of section 2 of the act of June 16, 1880, and as such is entitled to the repayment of the purchase money which was erroneously paid upon the said entry.

Petitioner further states that it applied to the Commissioner of the General Land Office on June 13, 1900, for the return of the purchase money paid upon the said entry and upon the 16th day of January, 1901, the Commissioner of the General Land Office re-

4 jected the application on the ground that it was not the assignee of the said Stoiber and the said decision was affirmed by the Secretary of the Interior under date of May 8, 1901.

Petitioner further states that the Commissioner of the General Land Office and the Secretary of the Interior and this court have decided that Edward G. Stoiber is not entitled to the repayment of the purchase money paid upon the said entry because of the fact that he had not furnished the money with which the said payment was

made and the petitioner further states that the said purchase money is now in the Treasury of the United States as a trust fund for the benefit of the petitioner.

Petitioner further states that it has executed a relinquishment of the said land is acordance with the forms prescribed by the Commissioner of the General Land Office under the act of June 16, 1880, and that the duplicate receipt No. 13, issued at the time of making the said entry has been surrendered and that the sum of $3,200 paid to the United States when the said entry was made has never been repaid to any person and is still in the Treasury of the United States.

Wherefore, petitioner prays judgment against the United States in the sum of $3,200.

HARVEY SPALDING & SONS,
Attorneys for Petitioner.

DISTRICT OF COLUMBIA,
City of Washington, ss.

On this 16th day of March, 1906, before me personally came Edwin W. Spalding, who being duly sworn, deposed and said that he is the attorney for the Colorado Anthracite Company, the claimant in the above named case; that no assignment of the said claim or any portion thereof or any interest therein has been made, and that the petitioner is entitled to the judgment for the amount therein stated, exclusive of all set-offs and just grounds of defense, according to affiant's knowledge and belief, and that the facts mentioned in the above petition are true.

EDWIN W. SPALDING.

Sworn to and subscribed before me this 16th day of March, 1906.

[SEAL.]

ELIZABETH L. MACFATE,
Notary Public.

5 II.—*Traverse. Filed February 4, 1908.*

COLORADO ANTHRACITE COMPANY *vs.* THE UNITED STATES.	In the Court of Claims of the United States. Term 1907–1908. No. 28904.

And now comes the Attorney-General, on behalf of the United States, and, answering the petition of the claimant herein, denies each and every allegation therein contained; and asks judgment that the petition be dismissed.

JOHN Q. THOMPSON,
Assistant Attorney-General.

III.—*Argument and submission.*

On the 4th day of February, 1908, this cause argued by Mr. Edwin W. Spalding and Mr. Louis A. Pradt for the claimant and by Mr. Franklin W. Collins for the defendants and submitted.

6 IV.—*Findings of fact and conclusion of law. Filed December 20, 1909.*

This case having been heard by the Court of Claims, the court, upon the evidence, makes the following

FINDINGS OF FACT:

I.

The Colorado Anthracite Company is a corporation, whose articles of incorporation bear date January 10, 1882; were sworn to May 17, 1882; and filed in the office of the secretary of state of Colorado on June 10, 1882.

II.

On June 18, 1881, Edward G. Stoiber made and executed a power of attorney to one Otto G. Schultz, granting said Schultz power to sell all of his property, real estate, etc., situated in Gunnison County, Colorado, and to give deeds to purchasers.

III.

On January 10, 1882, said Edward G. Stoiber, through Schultz, his attorney in fact, by quitclaim deed, attempted to convey to Henry E. Rood, for the consideration of $1, the SE. quarter of the NW. quarter, the NW. quarter of the SE. quarter, and the W. half of the NE. quarter of section 17, township 13 south, range 86 west; and on February 15, 1882, said Rood, by quitclaim deed, attempted to convey the same land, and for the same consideration, to one William
7 S. Devine; and on the 15th day of February, 1882, said Devine, for the same consideration, attempted to convey the same land by quitclaim deed to said Colorado Anthracite Company, whose articles of incorporation were not filed in the office of the secretary of state of Colorado until June 10, 1882, following.

IV.

On the 24th day of January, 1882, Edward G. Stoiber duly executed a power of attorney constituting Theodore H. Thomas, his attorney in fact, to make application to the United States through the proper land office for the entry and purchase of certain government lands, the same being coal lands, and particularly referring to the SE. quarter of the NW. quarter, the NW. quarter of the SE. quarter, and the W. half of the NE. quarter of section 17, township 13 south, range 86 west, Colorado.

V.

On the 31st day of August, 1882, Edward G. Stoiber executed before G. W. Goebel, a notary public, his affidavit and declaratory statement required by section 2349, Revised Statutes, alleging actual and continued possession of the land in question from the 1st day of September, 1881.

VI.

On the 14th day of August, 1883, Theodore H. Thomas, as attorney in fact for Edward G. Stoiber, executed the affidavit required by section 32 of the regulations under the coal-land laws approved July 30, 1882, to be made by each claimant at the time of actual purchase, and this affidavit was filed in the land office at Gunnison, Colorado, by the said Theodore H. Thomas, attorney in fact, October 31, 1883, which affidavit, so far as material here, reads: "I, Edward G. Stoiber, by Theodore H. Thomas, his attorney in fact, * * * do solemnly swear that I have never had the right of purchase under
8 the aforesaid provisions of law, either as an individual or as a member of an association, and that I have never held any other lands under its provisions; I further swear that I have expended in developing coal mines on said tract in labor and improvements the sum of one thousand dollars, the nature of such improvements being as follows: One log cabin and opening a well-defined vein of coal by shaft 50 feet; that I am now in the actual possession of said mines, and make the entry for my own use and benefit, and not directly or indirectly for the use and benefit of any other party."

VII.

In the meantime adverse claims have been filed by Elisha A. Buck and by G. T. W. Patrick for the SE. ¼ of the NW. ¼, the SW. ¼ of the NE. ¼ and the NW. ¼ of the NE. ¼ of said section 17, and a hearing in the case had been had and testimony submitted before the register and receiver at Gunnison September 20, 1883. Following the said hearing and before the register and receiver had rendered an opinion in the case they, on December 24, 1883, permitted the said Stoiber, through his said attorney in fact, Theodore H. Thomas, to make said coal entry and issued coal certificate and receipt No. 13 thereon and accepted from the said Thomas the sum of $3,200 in payment for the land. The money so paid was furnished by the Colorado Anthracite Company, who, prior to said entry, had acquired a quitclaim deed therefor, as set forth in finding 13. The power of attorney given to said Thomas January 24, 1882, was fourteen days after the claimant had sold and conveyed his interest in said land, as shown in said finding XIII.

VIII.

9 The said receiver's receipt read as follows:

"Received from Edward G. Stoiber, of Gunnison County, Colorado, the sum of thirty-two hundred dollars and cents, being in full

for the SE. ¼ of the NW. ¼, the NW. ¼ of SE. ¼, and the W. ½ of the NE. ¼ of section seventeen, in township 13 south, of range 86 west, 6th p. m., containing one hundred and sixty acres and hundredths, at $20.00 per acre. $3,200.00.

" FRED. J. LEONARD,
"*Receiver.*

"$ testimony fee received. Number of words ; rate per 100 words cents."

and that the register's certificate read as follows:

" LAND OFFICE AT GUNNISON, COLORADO,
"*December 24, 1883.*

"No. 13. It is hereby certified that, in pursuance of law, Edward G. Stoiber, residing at Gunnison, in Gunnison County, State of Colorado, on this day purchased of the register of this office the SE. ¼ of the NW. ¼, the NW. ¼ of the SE. ¼, and the W. ½ of the NE. ¼ of section 17, township 13 S., range 86 W., of the 6th p. m., Colorado, containing 160 acres, at the rate of twenty dollars and cents per acre, amounting to thirty-two hundred dollars and cents, for which the said Edward G. Stoiber has made payment in full as required by law.

"Now, therefore, be it known that, on presentation of this certificate to the Commissioner of the General Land Office, the said Edward G. Stoiber shall be entitled to receive a patent for the lot above described.

" JOHN J. THOMAS,
"*Register.*"

IX.

The opinion of the register and receiver rendered on December 28, 1883, was as follows:

" In the United States land office, Gunnison, Colorado.

COAL CONTEST.

EDWARD C. STOIBER, *v.* E. A. BUCK, CHARLES H. CASTLE, and G. T. W. PATRICK.	Involving the SE. ¼ of the NW. ¼, NW. ¼ of the SE. ¼, and the W. ½ of the NE. ¼ of section 17, township 13 S., range 86 W., 6th p. m.

10 "*Opinion of the register and receiver.*

" In the above case a hearing was ordered to take place September 20, 1883, before the register and receiver at the U. S. land office, Gunnison, Colorado. On the day set, Edward G. Stoiber appeared by his counsel, Thomas and Thomas.

" G. T. W. Patrick appeared by his counsel, Heims and Brown.

" E. A. Buck appeared by his counsel, Mills and Boisot.

" Charles H. Castle appeared not, but makes default.

"From the records of the U. S. land office, Leadville, Colorado (now Gunnison, Colorado), it appears that Edward G. Stoiber filed coal D. S. No. 200, October 31, 1882, alleging settlement September 1, 1881, for the SE. ¼ of the NW. ¼ and the NW. ¼ of the SE. ¼ and the W. ½ of the NE. ¼ of section 17, tp. 13 S., range 86 W., 6th p. m.

"G. T. W. Patrick filed coal D. S. No. 128, August 10, 1882, alleging settlement June 12, 1881, for the E. ½ of the NW. ¼, the SW. ¼ of the NE. ¼, and the NW. ¼ of the SE. ¼ of section 17, tp. 13 S., range 86 W., 6th p. m.

"E. A. Buck filed coal D. S. No. 209, December 16, 1882, alleging settlement April 12, 1882, for the E. ½ of the NW. ¼, the SW. ¼ of the NE. ¼, and the NW. ¼ of the SE. ¼ of section 17, T. 13 S., range 86 W., 6th p. m.

"It appears that Patrick filed his D. S. during the time the land in question was withdrawn from the market; that is to say, between the 7th day of October, A. D. 1880, and the 28th day of October, A. D. 1882. The evidence further shows that the said Patrick has not continually occupied and improved the land in controversy, but abandoned it for a period of six or eight months at a time.

"It also appears that Edward G. Stoiber and E. A. Buck have, since the filing of their respective declaratory statements, occupied and improved the land in question continuously, but as the filing of Stoiber was made prior to that of Buck, and as he has shown a compliance with the law, we have therefore allowed Edward G. Stoiber to enter under the coal land laws, the SE. ¼ of the NW. ¼, the NW. ¼ of the SE. ¼, and the W. ½ of the NE. ¼ of sec. 17, tp. 13 S., range 86 W., 6th p. m., without prejudice to any interest of Patrick's or Buck's.

"JOHN J. THOMAS,
"*Register.*

"FRED J. LEONARD,
"*Receiver.*

"U. S. land office, Gunnison, Colorado, December 29th, 1883."

11 X.

Elisha A. Buck and G. T. W. Patrick appealed from the decision of the register and receiver at Gunnison, rendered December 28, 1883, which was in favor of Stoiber, and upon the 1st day of February, 1887, the Commissioner of the General Land Office rendered an opinion upon the same evidence which was before the register and receiver in which the commissioner reversed the action of the local officers in allowing the entry to be made and held that Stoiber was not entitled to enter the land, for the reason that, substantially, it appeared from the evidence submitted in behalf of Stoiber that he had practically assigned the right to make an entry to the Colorado Anthracite Company, and upon an appeal by the said Edward G. Stoiber from the said decision of the Commissioner of the General Land Office the Secretary of the Interior, upon the 31st day of July,

1888, affirmed the decision of the Commissioner of the General Land Office.

XI.

The hearing had on September 28, 1883, before the local officers, the issue was to the right of Stoiber to make the entry. Buck had filed a protest against the right of Stoiber in the following terms:

"That the said Stoiber is not either personally or by agent in actual possession of the said land; that Stoiber has bargained, sold, and agreed to transfer all his right, title, and interest in the said land to the Colorado Anthracite Company or to some person in its behalf and for its benefit."

The fact that Stoiber has bargained and sold and had already deeded his title or interest in the land was admitted by the witnesses for Stoiber at this hearing in the testimony given by L. Kingsbury, Thomas J. Sterr, Samuel W. Harper, and by Theodore H. Thomas, the attorney in fact for Stoiber, and none of witnesses for the said Stoiber denied or concealed the fact that he had already deeded the land and that the entry was being made in the interests of the Colorado Anthracite Company.

XII.

In accordance with the decision of the Secretary of the Interior the said entry was canceled by the Commissioner of the General Land Office by letter dated August 10, 1888.

12 XIII.

The abstract of title shows that Edward G. Stoiber, per O. G. Schults, his attorney in fact, by quitclaim deed dated January 10, 1882, conveyed the SE. ¼ of the NW. ¼ and the NW. ¼ of the SE. ¼ and the W. ½ of the NE. ¼ of sec. 17, Tp. 13 S., R. 86 W., 6th p m, to Henry E. Rood, and that Henry E. Rood conveyed the said land to William S. Devine by deed dated February 15, 1882, and that William S. Devine conveyed to the Colorado Anthracite Company the same land by deed dated February 15, 1882, and that there were no other deeds affecting the title of the said Edward G. Stoiber to the said land between February 15, 1882, and August 10, 1888.

XIV.

On June 13, 1900, the Colorado Anthracite Company filed an application with the Commissioner of the General Land Office for the return of the purchase money paid upon coal entry No. 13, Gunnison, Colo., claiming to be the assignee of Edward G. Stoiber, and on the 16th day of January, 1901, the Commissioner of the General Land Office rejected the application of the Colorado Anthracite Company on the ground that it was not the assignee of the said Stoiber, for the reason that the said Stoiber had not deeded the land to the said com-

pany at any time subsequent to the allowance of the said entry and prior to the cancellation thereof, and the said decision was affirmed by the Secretary on May 8, 1901.

XV.

Thereupon Edward G. Stoiber applied for the return of the said purchase money and the said application was rejected by the Commissioner of the General Land Office under date of November 1, 1901, and the said decision of the Commissioner of the General Land Office was affirmed by the Secretary of the Interior on January 14, 1902, and the said decision was reaffirmed by the Secretary of the Interior on April 3, 1902, on a motion for review. Said Stoiber afterwards filed his petition in the Court of Claims under the act of June 16, 1880 (21 Stat. L., 287), for the recovery of said sum of $3,200 so paid by the claimant herein, but his petition was dismissed on the ground that he was not allowed to enter the land described and had paid no money therefor (41 C. Cls., 269).

13 XVI.

The said Edward G. Stoiber and the Colorado Anthracite Company have executed a relinquishment of the said land in accordance with the forms prescribed by the Commissioner of the General Land Office under the act of June 16, 1880, and that the duplicate receipt issued at the time the said entry was made has been surrendered, and that the said sum of $3,200 paid to the United States when the said entry was made has never been repaid to any person and is still in the Treasury of the United States.

CONCLUSION OF LAW.

Upon the foregoing findings of fact the court decides, as a conclusion of law, that the claimant company recover judgment against the United States in the sum of thirty-two hundred dollars ($3,200).

By the Court.

14 V.—*Judgment of the Court.*

The Colorado Anthracite Company, a corporation, v. The United States.	No. 28904.

At a Court of Claims held in the city of Washington on the 20th day of December, 1909, judgment was ordered to be entered as follows:

The court on due consideration of the premises finds for the claimant and do order, adjudge, and decree that the Colorado Anthracite Company (a corporation) do have and recover of and from the United States the sum of three thousand two hundred dollars ($3,200).

By the Court.

(The court filed no opinion in this case.)

VI.—*Application for and allowance of appeal.*

THE COLORADO ANTHRACITE COMPANY (a corporation) v. THE UNITED STATES.	Term 1909–1910. No. 28904.

From the judgment rendered in the above-entitled cause on the 20th day of December, 1909, in favor of the claimant, the defendants, by their Attorney-General, on the 28th day of February, 1910, make application for, and give notice of, an appeal to the Supreme Court of the United States.

JOHN Q. THOMPSON,
Assistant Attorney-General.

Filed in open court February 28, 1910.

Whereupon it was ordered that the appeal be allowed as prayed for.

BY THE COURT.

In the Court of Claims.

THE ANTHRACITE COMPANY, A CORPORATION. v. THE UNITED STATES.	No. 28904.

I, John Randolph, assistant clerk of the Court of Claims, certify that the foregoing are true transcripts of the pleadings in the above-entitled cause of the findings of fact and conclusion of law and judgment of the court, of the application of the defendants for and allowance of appeal to the Supreme Court of the United States.

In testimony whereof I have hereunto set my hand and affixed the seal of said Court of Claims this 7th day of March, A. D. 1910.

[SEAL.]

JOHN RANDOLPH,
Asst. Clerk Court of Claims.

(Indorsement on cover:) File No. 22058. Court of Claims. Term No. 470. The United States, appellant, vs. Colorado Anthracite Company. Filed March 10th, 1910. File No. 22058.

No. 227.

In the Supreme Court of the United States

October Term, 1914.

THE UNITED STATES, APPELLANT,

v.

COLORADO AND SOUTHERN COMPANY.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR THE UNITED STATES.

In the Supreme Court of the United States.

OCTOBER TERM, 1911.

THE UNITED STATES, APPELLANT,
v.
COLORADO ANTHRACITE COMPANY. } No. 227.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR THE UNITED STATES.

STATEMENT.

June 18, 1881, Edward G. Stoiber executed a power of attorney to Otto G. Schultz, empowering the said Schultz to sell all property, real estate, etc., situated in Gunnison County, Colorado, belonging to the said Stoiber, and to give deeds to purchasers.

On January 10, 1882, the said Stoiber through Schultz, his attorney in fact, attempted to convey by quitclaim deed to Henry E. Rood the SE. ¼ of the NW. ¼ and the NW. ¼ of the SE. ¼, and the W. ½ of the NE. ¼ of sec. 17, Tp. 13 S., R. 86 W., for the consideration of $1.00. On February 15, 1882, the said Rood attempted to convey by quitclaim deed, for the consideration of $1.00, the same land to one William S. Devine. On the same date, to wit, February 15, 1882, the said Devine, for the consideration of $1.00, by quitclaim deed, at-

tempted to convey the same land to the Colorado Anthracite Company, appellee in this cause.

The Colorado Anthracite Company is a corporation under and by virtue of the laws of the State of Colorado. The articles of incorporation bear date January 10, 1882, were sworn to May 17, 1882, and filed in the office of the secretary of state of Colorado June 10, 1882. (Rec., Finding I.)

On January 24, 1882, the said Edward G. Stoiber executed a power of attorney in favor of Theodore H. Thomas, whereby he authorized the said Thomas to make application to the United States for entry and purchase of certain Government "coal lands," particularly referring to the land hereinbefore described. (Rec., Finding IV.)

On August 31, 1882, the said Edward G. Stoiber made his affidavit and declaratory statement required by section 2349, Revised Statutes, in which he alleged actual and continued possession of the land in question from the 1st day of September, 1881.

On the 14th day of August, 1883, the said Theodore H. Thomas, as attorney in fact for the said Stoiber, executed the affidavit required by section 32 of the regulations under the coal-land laws approved July 30, 1882, and this affidavit was filed in the land office at Gunnison, Colorado, October 31, 1883. The affidavit, in so far as material to the record, reads as follows:

> I, Edward G. Stoiber, by Theodore H. Thomas, his attorney in fact, * * * do

> solemnly swear that I have never had the right of purchase under the aforesaid provisions of law, either as an individual or as a member of an association, and that I have never held any other lands under its provisions. I further swear that I have expended in developing coal mines on said tract, in labor and improvements, the sum of one thousand dollars, the nature of such improvements being as follows: One log cabin and opening a well-defined vein of coal by shaft 50 feet; that I am now in the actual possession of said mines, and make the entry for my own use and benefit, and not directly or indirectly for the use and benefit of any other party.

In the meantime other claimants, Elisha A. Buck and G. T. W. Patrick, filed claims for the foregoing described land, and testimony was submitted and the case heard before the register and receiver at Gunnison, Colorado, September 20, 1883. After the said hearing but before the register and receiver had rendered an opinion, to wit on December 24, 1883, they permitted the said Stoiber, through his said attorney in fact, Thomas, to make said coal entry and issued coal certificate and receipt No. 13 thereon, and accepted from the said Thomas the sum of $3,200 in payment for the land. The money so paid was furnished by the Colorado Anthracite Company, appellee herein, who held a quitclaim deed for the land, as we have stated, from William S. Devine, dated February 15, 1882.

The power of attorney given by said Stoiber to the said Thomas, January 24, 1882, was 14 days after the said Stoiber had conveyed his interest in the land by quitclaim to Henry E. Rood. The receiver's receipt for the purchase price of the land ran to the said Edward G. Stoiber, as set forth in Finding VIII. (Rec., p. 5.)

The register's certificate also ran to the said Stoiber, and describes the land as set forth in Finding VIII. (Rec., p. 6.) This certificate of the register, and presumably the receipt for the purchase price given to Stoiber by the receiver, bears date December 24, 1883. The decision and opinion of the register and receiver allowing the said Stoiber to enter the land under the coal-land laws, is dated December 29, 1883. (Rec., p. 7.) From the decision of the register and receiver granting the right to Stoiber to purchase the land, appeal was taken by Buck and Patrick to the Commissioner of the General Land Office. The commissioner rendered an opinion upon the same evidence that was before the register and receiver, and reversed the action of those officers in allowing the entry to be made by Stoiber, and held that Stoiber was not entitled to enter the land for the reason that he had practically assigned the right to make entry to the Colorado Anthracite Company, appellee in this cause.

Appeal was taken by the said Stoiber from the decision of the Commissioner of the General Land

Office to the Secretary of the Interior, who, on the 31st day of July, 1888, affirmed the decision of the commissioner. (Rec., Finding X.) At the hearing before the local officers, in September, 1883, it was admitted that Stoiber had already conveyed his interest in the land in question, and "none of witnesses for the said Stoiber denied or concealed the fact that he had already deeded the land, and that the entry was being made in the interests of the Colorado Anthracite Company." (Rec., p. 8.)

In accordance with the decision of the Secretary of the Interior the entry was cancelled by the Commissioner of the General Land Office by letter dated August 10, 1888.

The money paid, $3,200, set forth in the receiver's receipt, was furnished by the Colorado Anthracite Company, appellee in this cause. (Finding VII, Rec., p. 5.)

The said Stoiber and the Colorado Anthracite Company have executed a relinquishment, and the duplicate receipt issued at the time the entry was made has been surrendered.

On June 13, 1900, the Colorado Anthracite Company filed application with the Commissioner of the General Land Office for the return of the purchase price of said land so paid into the Treasury, and on January 16, 1901, the commissioner rejected the application for the return of the money to said company on the ground that it was not the assignee

of said Stoiber, for the reason that Stoiber had not deeded the land to the company at any time subsequent to the allowance of the entry and prior to the cancellation thereof.

This decision was affirmed by the Secretary May 8, 1901. (Rec., Finding XIV, p. 8.) Thereupon the said Stoiber applied for the return of the money, but his application was rejected by the Commissioner of the General Land Office November 1, 1901, which rejection was affirmed by the Secretary of the Interior January 14, 1902, and reaffirmed by the Secretary of the Interior April 3, 1902, on a motion for review.

Stoiber then filed his petition in the Court of Claims for recovery of the money, but his petition was dismissed on the ground that he was not allowed to enter the land described and had paid no money therefor. (41 C. Cls., p. 269.)

The appellee herein, the Colorado Anthracite Company, then filed its petition in the Court of Claims March 16, 1906, and after a hearing the court below, as a conclusion of law, found as follows:

> Upon the foregoing findings of fact the court decides, as a conclusion of law, that the claimant company recover judgment against the United States in the sum of thirty-two hundred dollars ($3,200).
>
> By the Court.

THE ISSUES.

The questions here for consideration are:

1. Whether or not the Colorado Anthracite Company is "the person who made such entry," or "his heirs or assigns," within the meaning of those terms as used in section 2 of the act of June 16, 1880 (21 Stat. L., 287).

2. Whether or not the findings of fact and record in this case contain sufficient evidence to justify the court in holding that appellee was guilty of fraud in attempting to make the entry, and in the payment of the money now sought to be recovered.

3. Was the court below justified in making its conclusion of law and entering judgment on the facts as disclosed by the record?

ASSIGNMENTS OF ERROR.

The court erred—

1. Because it failed to find, as a conclusion of law, that the appellee is not "the person who made such entry," or the "heirs or assigns" of Stoiber, in whose name the entry was made, within the meaning of those terms as employed in the act of June 16, 1880, for the reason that said act contemplates as "assigns" only those persons who become assignees of *bona fide* entrymen *subsequent to the allowance of the entry, and the issuance of the register's certificate and receiver's receipt thereon,* and are themselves not connected with any fraud in the making or perfection of such entry.

2. Because it failed to find that the appellee ought not to recover on the ground of its participation in an attempted fraud against the United States in that the money, the repayment of which is sought, was paid by the appellee in the making of the purchase in the name of Stoiber, contrary to the requirements of the public land laws of the United States and in fraud of the United States.

3. Because the conclusion of law and the judgment entered are not justified by the facts found.

ARGUMENT.

By permission we here present the argument from the viewpoint of the Department of the Interior, as prepared by Mr. F. W. Clements, first assistant attorney:

> A fair deduction from the findings of the court below is that the entire proceedings respecting the filing of the coal declaratory statement and the subsequent purchase in the name of Stoiber were, in truth and fact, in the interest of the Colorado Anthracite Coal Company. (See Finding XI, p. 8.)
>
> Under the regulations of the Land Department, Stoiber could not transfer his bare personal right to make a coal-land entry. The coal-land law (sections 2347–52, Revised Statutes) plainly shows the legislative purpose to prevent the exercise by any person of the right to purchase more than once (section 2350). If the mere right to make entry was vendible, it is easy to see

how the law could be circumvented: A., who is disqualified, desires to make an entry, but he can not in his own right, because that has once been exercised. B., however, fully qualified, has an unused right. B. may not sell this naked right to A.; if he might, the purpose of section 2350 could easily be defeated. Suppose, however, A. secretly employs B. to exercise B.'s right in A.'s interest, furnishes him the money, and takes a quitclaim deed of the property to insure B.'s living up to his agreement. Exactly the same result would be accomplished if this could lawfully be done. A., disqualified, could go on acquiring in this manner as many entries as he could find qualified entrymen who would use their rights in his interest. This was the situation in the Keitel case (211 U. S., 370), further to be considered in this brief.

To escape this avoidance of the law a regulation had to be adopted. Section 2351, Revised Statutes, authorizes the Commissioner of the General Land Office to issue all needful rules and regulations for carrying into effect the provisions of sections 2347, 2348, 2349, 2350, and 2351. So section 39 of the "Circular Instructions" of the General Land Office, dated April 15, 1880, Sickel's Mining Laws, 551 (and the same is true of section 32 of the "Rules and Regulations" of July 31, 1882, affecting the coal-land laws), provided a form of affidavit to be made by each claimant at the time of actual purchase of the coal land pursuant to a

preference right. The material portion of that affidavit is set forth in Finding VI, p. 5 of the record. It requires the entryman to make solemn oath that he made the entry for his "*own use and benefit*, and not *directly* or *indirectly* for the use and benefit of *any other party.*"

This regulation is a proper derivative of the statute and, for reasons indicated, is necessary to the accomplishment of the design of the statute—to secure the land to the use of bona fide entrymen and to exclude from its operation not only those disqualified at the time by having already exhausted the right to make entry, but *those who while at that time qualified are seeking by indirection to defeat the purpose of the act* in acquiring more than 160 acres of coal land.

This court, in *United States* v. *Keitel, supra,* has held that a person qualified to enter coal lands in his own behalf is prohibited from making an entry ostensibly for himself but in fact as agent for another who is disqualified; that the statutes in regard to coal lands limit the amount of land to be taken by each person entering; and that while there may be no statutory limitation on the right of the entryman to sell "*after acquisition,*" a qualified person may not acquire land as agent for a disqualified person and so defeat the purpose of the statute; and that a person can not enter land through an agent, even though the agency be undisclosed, if he is disqualified to enter the land

himself. Why? Because the court will not countenance any effort to evade the spirit and purpose of the law by indirection. The "indirection" may take the form found in the Keitel case—a disqualified entryman making use of the rights of admittedly qualified entryman—the object being to acquire more land than the law contemplates. But it may take another form, just as fatal to the fulfillment of the purpose of the coal-land law. Suppose A., qualified to enter 160 acres, but desirous of entering more—640 acres in contiguous tracts, let us say—reads the Keitel decision, and is forthwith informed that if he exercises his individual right he may not utilize the rights of "dummy" entrymen—men who have not exhausted their rights and are willing to exercise them for A.'s benefit; for then he would become a "disqualified entryman," for whom the qualified entrymen may not act. So he devises this scheme: He, not disqualified, procures B., C., and D., who are qualified, simultaneously to make entries in his behalf, the agency being undisclosed; he furnishes the money and the entries are passed to patent; then A., through the coercive effect of contracts to convey, or, as in the case at bar, through quitclaim deeds taken before the actual purchase is consummated, comes into possession of three tracts of 160 acres each without having exhausted his personal right. "Qualified," he completes the transaction by entering the re-

maining 160 acres; and his right can not be gainsaid, for he has not used his right to enter the 160 acres which the law allows. The purpose of the law is circumvented as completely as it was in the Keitel case, even if A. has kept within the letter of it. But the fact remains that he has induced B., C., and D. to violate the spirit of the law for his benefit. The citation from *United States* v. *Budd* (144 U. S., 154), in the Keitel case (p. 391), is apposite:

"The act does not in any respect limit the dominion which the purchaser has over the land *after its purchase* from the Government, or restrict in the slightest his power of alienation. All that it denounces is a *prior agreement*, the *acting for another* in the purchase. If when the title passed from the Government *no one save the purchaser* has any claim upon it, or any contract or agreement for it, the act is satisfied."

A., in the case instanced, has an interest—the whole substantial interest—which B., C., and D. seek to acquire by the purchase. When the title passes from the Government, some one, not B., C., or D., the nominal purchasers, has a claim upon the several tracts.

In fact A. is the principal throughout, and B., C., and D. are merely, in common parlance, "dummy entrymen."

How, then, can A. pose as the "assign" of B., C., and D.? At the time of the execution of the deed or agreement, prior to the actual purchase of the land, neither B., C., nor D.

had any vendible interest in the *land*. They had not acquired the property; they may have acquired a preference as against other possible claimants to purchase the property; but that preference could only be waived, for any assignee thereof must, in perfecting purchase, do so *in his own right*, and when so purchased his right under the coal-land laws is thereby exhausted. (See *United States* v. *Forrester*, 211 U. S., 399.)

Now in the case at bar, Stoiber undertook to sell the *land* before even his declaratory statement was filed and long before an actual purchase was made. The appellee "purchased" whatever Stoiber had long prior to Stoiber's acquisition of any *prima facie* equitable title to the land. The record does not show whether the Colorado Anthracite Coal Company was disqualified or not. It does show that it furnished the money which Stoiber paid to the Government; it does show that Stoiber, through an attorney, when presenting the money furnished by the company, falsely swore that he was making the entry for his "own use and benefit, and not for the use and benefit of any other party," whereas in truth and in fact he made the entry solely for the use and benefit of the corporation which had furnished the money and to which he had already, through mesne conveyances, undertaken to quitclaim his interest in the property. The undertaking was against public policy and against the spirit and in defeat

of the purpose of the coal-land laws. How can a party thus conniving to avoid the law pose as a *bona fide* " assign " of its agent? Stoiber had no lawful right to alienate the land before he had acquired it; the company had no lawful right to acquire it before the entryman had purchased it.

As this court said in *Hoffield* v. *United States* (186 U. S., 273, 279):

" Inasmuch as, in the absence of a statute, there could be no recovery of the purchase money, one who seeks to take advantage of it must bring himself clearly within its equity as well as within its letter, and must show himself entitled not only to the land itself, but to everything which the statute has annexed thereto as an incident."

If the record showed that the appellee was disqualified at the time it procured this entry to be made, we think, on the strength of the Keitel case and *United States* v. *Trinidad Coal and Coking Company* (137 U. S., 160), that it clearly would not be entitled to recover. In the view we have already advanced, we think the rule is the same even if the appellee were qualified. But if there be a difference, then we submit that it is incumbent upon the claimant, seeking the recovery of money under the provisions of the act of June 16, 1880, to show that it comes clearly within the equity of the statute by producing proof that it was not disqualified to take public coal lands of the United States at the time it dealt with Stoiber. But the petition

(record, p. 1) does not contain even an averment that the company was not disqualified. Its method certainly suggests an intended circumvention of the law; either that it was then disqualified through the exhaustion of the coal-land rights of one or all of the associates, or that it then had the purpose of acquiring more coal land of the United States than the law allows. And in our view it is immaterial whichever way the company designed to act. Stoiber had filed no declaratory statement, nor, so far as the record shows, was he entitled to a preference right to purchase. So far as the Land Department is concerned, he was unknown to the Government at the time he undertook to convey the Government's land by a quitclaim deed. Were the company qualified, the simple, natural, and straightforward way would have been for it to induce Stoiber to step aside in its interest, whereupon it could have perfected title in its own name and right. This method would at least have enabled the Government to know with whom it was dealing; it would then have had a record that the company had exercised its right under the coal-land laws.

If it be lawful for the appellee to act as it acted in the Stoiber case, contemplate for a moment the possibilities of acquiring a monopolistic interest in Government coal lands that the scheme permits: Had the company been successful and did not thereby exhaust its individual right, it could go on

ad infinitum in the same manner and at no substantial risk; for if the judgment of the Court of Claims is well founded, the most the company might lose would be the particular tract for which it had furnished the purchase price—the purchase price itself, upon detection and cancellation of the illegal entry, would be returned. The judgment, if it stands, means practically this invitation: "Get the land any way you can, even if you violate the spirit if not the letter of the law; if you are found out and are deprived of getting the land, you nevertheless may have your money back."

There is another aspect of the case which precludes appellee from being an "assign" within the meaning of the repayment act. In the Hoffeld case (186 U. S., 273) this court held that "the right to a return of the purchase money is in no sense an incident to the land, and did not pass to the purchaser upon the sale under the execution." The right to the return of the money itself can not be assigned, for that would be the assignment of a money claim against the United States, prohibited by Revised Statutes, sec. 3477.

The right to a return of the purchase money, while not an incident to the land, is probably not wholly independent of an interest in the land—that is, a voluntary assignment of the right of repayment can not be separated from a voluntary assignment of the land itself. For, as a condition to repay-

ment, the assign must be in a position to return the receiver's receipt and to file a relinquishment—neither of which he would be able to do unless he were an "assign" of the land itself, possessed of the full title therein had the entry been valid.

The view we wish to advance is this: A voluntary assignment entitling the "assign" to repayment under the circumstances mentioned in the act involves an assignment of two things—such apparent title as the entryman has in the land itself, *coupled with a right to repayment* under certain contingencies *existing in him*, the entryman. If *he* has no such right, *he* can not assign such right. It is only the entryman's "assigns" that the statute deals with. The assignee takes no more than his assignor had. The right to repayment is predicated upon the good faith of the entryman who is so unfortunate as to make an entry erroneously allowed by local land officers (and, of course, one which can not be confirmed, or where the entry is in conflict with a superior claim, and must for that reason be canceled). The error must be that of the local land officers; the entryman must at least have acted in good faith. If the land officers pass upon proofs sufficient on their face, and it afterwards develops that the proofs are false, the entry is canceled, not because it was erroneously allowed but because it was fraudulently procured by the entryman. In such case, the entryman is not entitled to repay-

ment; and if he has transferred his apparent interest in the land to another, the latter takes merely what the entryman possessed, subject to all disabilities, latent or otherwise.

The Court of Claims held (41 Ct. Cls., 269) that Stoiber has or had no right to repayment under the law. Not only was the money paid the Government not his money but he deliberately, through his attorney in fact, swore falsely that he had made the entry in his own right and for his own benefit and not for the benefit of any other person. If he had anything to assign to the appellee, it is quite apparent that it was not a right to repayment. Nor could the "assign," if it took such title as Stoiber had in the land by operation of the quitclaim deed, acquire thereby any right to repayment, because that right is not incident to the land itself. Nor could it annex the right of repayment to the interest in the land so acquired simply because it happened to be the party really making the payment sought now to be recovered.

As a matter of fact, so far as the payment of the money to the Government is concerned, the appellee is the principal in this transaction. Stoiber, from the record as a whole, appears in the light of a mere agent of the appellee from the beginning of proceedings in the Land Department. True, there was such a document as a deed, the ultimate grantee being the appellee. But the entire transaction indicates that the

deed was made for the purpose of insuring to the company whatever Stoiber could secure through the operation of the scheme from the Government. The $3,200 was not paid to Stoiber as a consideration for the transfer; it was paid to him exactly as a principal pays over to the agent the money needed to perfect a transaction. The money was at no time and in no sense Stoiber's money; it was at all times until it passed into the hands of the receiver of the land office the money of the company. Stoiber was merely the channel through which it passed from the one owner to the other. The company, as principal in the payment of this money, did not act in the capacity of entryman; and it involves a grotesque application of well-defined terms to think of it as the "assign" of itself. The law confers the right to repayment upon "the person who made such entry or to his heirs or assigns."

Do the findings show that appellee fraudulently attempted to acquire title?

As we have seen, the receipt for the purchase money given by the receiver and the register's certificate both ran to Stoiber and both were dated before those officers rendered their decision in the contest case between Stoiber, Buck, and others.

Finding IX shows that the opinion was rendered December 28, 1883, and that the hearing was ordered to take place September 20, 1883. Finding

XI is to the effect that the hearing was actually had on September 28, 1883, before the local officers, and that the issue there was as to the right of Stoiber to make the entry. At this hearing, whether on September 20 or September 28, 1883, makes but little difference, the fact was disclosed for the first time to the United States officials that appellee was in any way concerned or had any interest in the land in question.

From the time that Stoiber executed the first power of attorney, to wit, June 18, 1881, until the hearing in September, 1883, there was nothing which indicated to the Government officials that appellee was interested in these coal lands; and at the hearing the company did not come forward by any of its officials, so far as the record shows, and disclose the fact that it was seeking to acquire title thereto. The witnesses for Stoiber, when interrogated, admitted that Stoiber had already conveyed his interest in the land and that the entry was being made for the Colorado Anthracite Company. It is true that the appellees held a quitclaim deed of date February 15, 1882, but this deed, even if it were eligible to record under the laws of the State of Colorado, would not give notice of any kind to the United States officials that appellee was seeking to perfect title to this land.

There is no affirmative allegation in the petition nor anything in the findings of fact to the effect that appellee had the right to enter the land in

question. There is nothing to show in the findings of fact that Stoiber or his attorney in fact, who made the affidavit set forth in Finding VI, were either officers, stockholders, or employees of the Colorado Anthracite Company.

The officers of this association and its stockholders, and the association itself, may have exhausted all the rights to make entry of coal lands as provided in the public land laws. If this association had this right it seems to have been carefully concealed.

Section 2347, Revised Statutes, sets forth the qualifications necessary to entitle a person " or any association of persons severally qualified " to make entry of coal lands. The requirements are to the effect that every entryman must be above the age of 21 years, a citizen of the United States, or who has declared his intention to become such citizen.

Section 2348, Revised Statutes, provides that any such person or association of persons severally qualified as above provided, who have opened and improved lands and shall be in actual posession of the same, shall be entitled to a preference right of entry of the mines so opened and improved.

Section 2349, Revised Statutes, provides that all claims must be presented to the register of the proper land district within sixty days after the date of actual possession and the commencement of improvements on the land by filing a declaratory statement therefor.

Section 2350, Revised Statutes, provides, in part, that—

> The three preceding sections shall be held to authorize only one entry by the same person or association of persons; and no association of persons any member of which shall have taken the benefit of such sections either as an individual or as a member of any other association shall enter or hold any other lands under the provisions thereof; and no member of any association which shall have taken the benefit of such sections shall enter or hold any other lands under their provisions; and all persons claiming under section 2348 shall be required to prove their respective rights and pay for the lands filed upon within one year from the time prescribed for filing their respective claims.

The apparent concealment of the fact that this entry was being made for the benefit of the appellee in the face of all of the requirements necessary, as set forth in these statutes, is, to say the least, a strong indication that the company was not entitled or qualified to make the entry, and thereby a fraud was attempted to be perpetrated on the United States. This fraud, if such it be, was not disclosed to any Government official until the contest hearing between Stoiber and other claimants in the latter part of September, 1883; and then it was not disclosed by the company or any officer or other person authorized to speak for it.

Section 1 of the act of March 26, 1908 (35 Stat. L., p. 48), provides:

> That where purchase moneys and commissions paid under any public-land law have been or shall hereafter be covered into the Treasury of the United States under any application to make any filing, location, selection, entry, or proof, such purchase moneys and commissions shall be repaid to the person who made such application, entry, or proof, or to his legal representatives, in all cases where such application, entry, or proof has been or shall hereafter be rejected, and neither such applicant nor his legal representatives shall have been guilty of any fraud or attempted fraud in connection with such application.

Just why the local officials should hasten to execute the receipt and certificate of December 24, 1883, some four days before they rendered their opinion to the effect that Stoiber was entitled to make the entry, and to do so in view of the testimony given at the hearing to the effect that the entry was in the interests of appellee, as set forth in Finding XI, may be a matter of some conjecture. The whole proceeding, we think, constitutes an attempt to fraudulently gain title to these lands on behalf of appellee through Stoiber, who was undoubtedly in collusion with the claimant company. The entire transaction bears the impress of evasion of the spirit of the public land laws. Appellee company sought by indirection and circumlocution to

acquire a title which evidently it could not acquire in any other manner. Every officer and stockholder in this association, so far as this record discloses, may have been ineligible to make entry of one foot of the public domain.

The entry was finally canceled by the direction of the Secretary of the Interior August 10, 1888. (Rec., 8, Finding XII.) There is no record that the company made any objections to the cancellation of the entry; neither is there any evidence that it had any claim or asserted any claim against the Government for the repayment of this money until June 13, 1900 (Rec., Finding XIV), when it filed its application with the Commissioner of the General Land Office for the return of the purchase money.

During all this time, a period of nearly twelve years, appellee raised no objections and asserted no claim or right to repayment. It may be that this long silence and failure to make application for the return of the money is another evidence that appellee realized the proceedings were not such as to reflect credit on the company and establish good faith on the part of its officials. We think the facts disclosed furnish a proper basis for this court to here apply the maxim *Ex dolo malo, non oritur actio.*

The Government can act only through its agents. They come and go and pass out of existence. A transaction fresh in the memory and within the knowledge of an official at one period ofttimes be-

comes hazy, obscure, and difficult of understanding to future officers whose attention may be called thereto. Secure from prosecution by lapse of time, change of officials, and reliance upon a misunderstanding of the facts may have encouraged this appellee after twelve years to disregard the evidence of attempted fraud and make its application to the Secretary for repayment of this fund.

We submit that the record bears satisfactory evidence of attempted fraud on the part of appellee, and therefore it is not entitled to recover.

It may be suggested that on the trial the Government did not file answer affirmatively alleging fraud, but on the other hand relied upon the general denial which the statute provides shall be considered filed in the absence of any demurrer or other pleading within a certain time.

In the case of the *Western Central Railroad* v. *The United States* (164 U. S., 190) suit was brought in the Court of Claims to recover certain moneys withheld by the Post Office Department. To each and every allegation contained in the petition the Government interposed a general traverse. On the hearing of the case in this court the appellant contended that the Government should have pleaded a counterclaim or set-off, and upon that question Mr. Chief Justice Fuller said:

> Moreover, it has been repeatedly held that the forms of pleading in the Court of Claims are not of so strict a character as to require

> omissions of this kind to be held fatal to the rendition of such judgment as the facts demand. (*United States* v. *Burns,* 12 Wall., 246, 254; *Clark* v. *United States,* 95 U. S., 539, 543; *United States* v. *Behan,* 110 U. S., 338, 347; *United States* v. *Carr,* 132 U. S., 644, 650.

So we contend here that it was not necessary to affirmatively allege fraud, but, on the other hand, if there is sufficient in the findings by which fraud or attempted fraud on the part of appellee may fairly be inferred, this court is justified in taking cognizance thereof. It is true the court below did not find, in so many words, that appellee was guilty of fraud or attempted fraud, but it did make the findings disclosed in this record, and we do not believe it is necessary to do more than present the actual facts, and from such findings this court may draw its conclusions and render its judgment as the facts demand. (*Oscanyan* v. *Arms Co.,* 103 U. S., 267–9.)

Appellee not the assignee within the meaning of the statute.

The company relies for recovery upon section 2 of the act of June 16, 1880. For the convenience of the court we here insert that portion of the section applicable to this case:

> SEC. 2. In all cases where homestead or timber-culture or desert-land entries or other entries of public lands have heretofore or shall hereafter be canceled for conflict, or

> where, from any cause, the entry has been erroneously allowed and cannot be confirmed, the Secretary of the Interior shall cause to be repaid to the person who made such entry, or to his heirs or assigns, the fees and commissions, amount of purchase money, and excesses paid upon the same upon the surrender of the duplicate receipt and the execution of a proper relinquishment of all claims to said land, whenever such entry shall have been duly canceled by the Commissioner of the General Land Office.

We have shown that appellee is not entitled to recover as "the person who made such entry." The whole record shows that the entry was not made by the company, not attempted to be made by the company, and that as a matter of fact there was no entry whatever made by either the company or Stoiber, and therefore appellee can not be considered as an entryman within the meaning of the statute.

Neither is it entitled to recover as assignee of Stoiber.

The only grounds upon which appellee can claim assignment are by virtue of the quitclaim deeds made by said Stoiber and his grantees. The deeds, traced back, find their inception in the power of attorney executed by Stoiber to Schultz June 18, 1881, a date prior to the existence of appellee as a corporation.

The Schultz quitclaim deed made to Rood January 10, 1882, by virtue of the power of attorney was also executed before appellee had complied with

the necessary procedure to constitute it an incorporated body, and in turn the quitclaim deeds from Rood to Devine and from Devine to the appellee were made before the articles of incorporation were sworn to and filed in the office of the Secretary of State. Stoiber had nothing to assign because he was not the entryman and, therefore, had no power to make an assignment of the land or any interest therein.

In 41st Court of Claims Report, p. 275, the court said, referring to Stoiber's claim for repayment of the money: "Such repayment presupposes payment of the purchase money by the person who made the entry." * * * "As the claimant was not allowed to enter the lands and paid no money therefor, he is not entitled to recover, and his petition is therefore dismissed."

If Stoiber was not entitled to enter the lands, he could, of course, make no assignment of the lands. If it is asserted that Stoiber's power of attorney to Schultz and the various quitclaim deeds thereunder constituted an assignment of the money furnished by appellee at the time the entry was sought to be made, then we contend that as Stoiber did not furnish the money or any part thereof and had no interest therein, that he could not assign the claim for the repayment of this money to appellee. Furthermore, this contention of an assignment of a claim against the United States would be in direct conflict with section 3477, Revised Statutes, which sets

forth the manner in which an assignment can be made and which must be done "after the allowance of such a claim, the ascertainment of the amount due, and the issuance of a warrant for the payment thereof."

The quitclaim deeds made by virtue of Stoiber's power of attorney, executed long before there was any title to convey and before this company was in existence, could not in reason be considered as a transfer of a right to the repayment of money which Stoiber never owned and in which he had no interest.

Is the company barred by the statute of limitations?

If appellee is entitled to maintain this action under section 2 of the act of June 16, 1880, probably the statute of limitations would not begin to run until after the Secretary of the Interior had disallowed the claim made by the company, which was May 8, 1901, as set forth in Finding XIV.

If, however, the appellee is not entitled to recover under said section 2, because it was neither an entryman nor the assignee of an entryman, nor the assignee of a claim for money against the United States properly assigned, then the latest date which it can be said the action accrued was August 10, 1888, when the Commissioner of the General Land Office canceled the entry by direction of the Secretary of the Interior, as set forth in Finding XII.

The petition, however, was not filed until March 16, 1906. If appellee had no rights under said

section 2, supra, its petition to recover under any other statute or upon any principle must have been filed within six years from the date on which the action accrued, which we contend was August 10, 1888, when the entry was canceled. We ask that the judgment be reversed and the cause remanded with directions to the Court of Claims to dismiss the petition.

JOHN Q. THOMPSON,
Assistant Attorney General.

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Office Supreme Court, U. S.
FILED.
APR 29 1912
JAMES H. McKENNEY,
CLERK.

IN THE

Supreme Court, District of Columbia.

THE UNITED STATES, *Appellant*,
v.
THE COLORADO ANTHRACITE COMPANY. } No. 227.

REFERENCES AND ADDITIONAL AUTHORITIES IN BEHALF OF APPELLEE.

The following cases are among those referred to at the oral argument and not mentioned in the brief for appellee:

Authorities upon the assignability of rights under the land laws where assignment is not restricted by express statute.

Thredgill v. *Pintard*, 12 Howard, 24.
Maxwell v. *Moore*, 22 Howard, 185.
French v. *Spencer*, 21 Howard, 228.
Lamb v. *Davenport*, 18 Wallace, 307.

Authorities upon the right of assignment of claims under the mining laws.

Manuel v. *Wulff*, 152 U. S. 505.
Black v. *Mining Co.* 163 U. S. 445.
Forbes v. *Gracey*, 94 U. S. 762.

Rights under the coal land statutes held to be assignable by the Secretary of the Interior if assignment made to qualified entryman.

Kerr v. *Utah-Wyoming Improvement Co.* 2 Land Decisions, 227, decided October 25, 1883.
See also: *United States* v. *Trinidad C. & C. Co.* 37 Fed. Rep. 180.

In the following cases the question was not of the assignability of rights but of conspiracy to evade the restrictions.

United States v. *Munday*, 222 U. S. 175.
United States v. *Keitel*, 211 U. S. 370.
United States v. *Trinidad Co.* 137 U. S. 161.

Authorities upon the illegality of the requirement by the Department of affidavits where affidavits are not required by statute.

The United States v. *Williamson*, 207 U. S. 425.
Adams v. *Church*, 193 U. S. 510.

Authorities upon the definition of assignee under the act of June 16, 1880.

Adolph Emert. 14 Land Decisions, 106.
United States v. *Commonwealth Title & Insurance Co.* 193 U. S. 651.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1901.

No. 227.

THE UNITED STATES, Appellant,

v.

THE COLORADO ANTHRACITE COMPANY.

Appeal from the Court of Claims.

Brief for the Colorado Anthracite Company

E. W. [illegible]

Attorney for Appellee.

IN THE

Supreme Court of the United States.

October Term, 1911.

THE UNITED STATES, *Appellant*,
v.
COLORADO ANTHRACITE COMPANY. } No. 227.

Appeal from the Court of Claims.

BRIEF FOR APPELLEE.

This case is a claim for repayment of the sum of $3,200 paid by the appellee for 160 acres of coal lands to which it did not obtain title. It is essentially a claim based upon a failure of consideration. It is evident that where an entryman or a party seeking to enter lands has paid to the Government the full price for such lands and fails to obtain title to the land there is an entire failure of consideration and the purchase money should be repaid to the party making the payment.

Originally all such cases had to be paid through a special act of Congress and a special appropriation, but many years ago Congress passed a general law upon the subject authorizing the Secretary of the Interior to make repayment "upon proof being made to his satisfaction that any tract of land has been erroneously sold by the United States so that for any cause the sale can not be confirmed," and a permanent appropriation was made

for such purpose. This provision is found in Section 2362 of the Revised Statutes. In the course of time this law was narrowly interpreted by the Secretary of the Interior so that on June 16, 1880, Congress passed another act relating to repayments and provided:

> "Section 2. In all cases where homestead or timber-culture or desert land entries or other entries of public lands have heretofore or shall hereafter be canceled for conflict, or where, for any cause, the entry has been erroneously allowed, and can not be confirmed, the Secretary of the Interior shall cause to be repaid to the person who made such entry, or to his heirs or assigns, the fees and commissions, amount of purchase money, and excesses paid upon the same upon the surrender of the duplicate receipt and the execution of a proper relinquishment of all claims to said land whenever such entry shall have been duly canceled by the Commissioner of the General Land Office."

By the Third Section a permanent appropriation is made for the payment of such claims. Applications under the act are acted upon and allowed and paid without regard to the length of time that may have elapsed from the date of the cancellation to the date of the application.

The record in this particular case shows that this entry was erroneously allowed and could not have been confirmed and the case comes, therefore, squarely within the provisions of the act of June 16, 1880, providing for repayment in such cases. The act of June 16, 1880, has been many times construed by the Secretary of the Interior and many of these decisions are found in the published decisions of the Department of the Interior. The rules adopted by the Department and its decisions from time to time bring this case squarely within the repayment act and it is difficult to understand why the claim of this

appellee has been denied by the Department, in the face of the number of recorded decisions holding such a claim as this to be repayable.

It is not necessary to cite all of these decisions, but a few of them will show the construction put upon this act by the Department and the practice of the Department under it. The decisions show that cases in all respects similar to this in principle have been allowed and paid by the Department. In the case of Henry Cannon (Decisions of the Department of the Interior, Vol. 30, page 362) the Secretary held, according to the syllabus:

> "Excepting instances of cancellation for conflict, the criterion by which to determine whether repayment is authorized by Section 2 of the act of June 16, 1880, is not, What was the reason for the cancellation of the entry? but, Was the entry erroneously allowed and not susceptible of confirmation?"

This rule—that is, that repayment is due when it appears that the entry has been erroneously allowed and is not susceptible of confirmation—has been followed in thousands of cases and is the rule at the present time.

Moreover, it has been decided over and over again exactly what it is that constitutes an erroneous allowance of an entry so as to bring it within the provisions of this law. Such definition is found in the case of Geo. M. Dyer (Vol. 26 L. D. 284) in which the Secretary held, according to the syllabus:

> "An entry is 'erroneously allowed' within the meaning of the statute providing for repayment, if the General Land Office, in acting upon the proofs accepted by the local office, finds such proof insufficient, and cancels the entry for such reason."

A similar decision is found in Vol. 17, page 489, in which it is stated:

> "When the local officers decide that the proofs presented show a sufficient compliance with the land laws, and a certificate is issued to that effect, and the money is paid for the land and a receipt given therefor, and when a further examination of the same proofs by your office or this Department results in a different judgment, showing that the local officers were in error in admitting the sufficiency thereof and allowing the entry, the same has been 'erroneously allowed' within the meaning of the second section of the act of June 16, 1880, and repayment in such case is authorized."

Such is the rule and practice at the present time and the principle has never been controverted by the Department.

The record in this case shows that this entry was allowed by the local officers upon evidence which was afterward held by the Commissioner of the General Land Office and the Secretary of the Interior to be insufficient, and that the entry was canceled by the Commissioner of the General Land Office and the Secretary of the Interior upon the very same evidence upon which it had been allowed by the local officers. This is, therefore, a case of the erroneous allowance of an entry as defined by the act of June 16, 1880, and it is, therefore, the duty of the Secretary of the Interior under the provisions of that act to cause repayment to be made of the purchase money.

Inasmuch as the record and decisions of the Department show that repayment is due in this case under the provisions of the act of June 16, 1880, it becomes necessary to examine the reasons given by the Department and in the brief for the appellant for the failure of the Department to allow the application for repayment. The record shows that this was a coal land entry, and that it was allowed by the local officers in the name of Edward G. Stoiber and that a receipt for $3,200 was given in the

name of Edward G. Stoiber. The entry was allowed by the local officers on December 24, 1883, and was finally canceled by the Commissioner of the General Land Office by letter of August 10, 1888. The act of June 16, 1880, provides:

> "The Secretary of the Interior shall cause to be repaid to the person who made such entry, or to his heirs or assigns, the amount of purchase money," etc.

and in the regulations adopted for the administration of this act it is stated that an assignee is one who has purchased the land covered by the entry subsequent to the allowance of the entry and prior to the cancellation thereof.

Finding 14, on page 8 of the Record, shows that the appellee filed its application for repayment on June 13, 1900, claiming to be the assignee of Edward G. Stoiber and on the 16th day of January, 1901, the Commissioner of the General Land Office rejected the application of said company on the ground that it was not the assignee of said Stoiber, for the reason that Stoiber had not deeded the land at any time subsequent to the allowance of the entry and prior to the cancellation thereof, and this decision was affirmed by the Secretary of the Interior on March 8, 1901. Finding 15, page 9, states that thereupon Edward G. Stoiber applied for the return of the purchase money and this application was rejected by the decision of the Secretary on January 14, 1902. The ground given for this rejection, although it is not stated in the finding, is that repayment could not be made to Stoiber for the reason that it was shown by the record that he had not paid the money and that he, therefore, had no standing to apply for repayment of the money. Stoiber afterward filed a petition in the Court of Claims for the recovery of the sum of $3,200, but his petition was

dismissed by the Court on the same ground substantially as the Secretary had assigned for rejecting his application for repayment. This decision of the Court of Claims was accepted by the parties interested and no appeal was taken to this court. The appellee then filed its suit in the Court of Claims and the Court of Claims rendered its judgment in its favor on December 20, 1909.

It thus appears that the Department rejected first the claim of the present appellee on the ground that it was not the assignee of Stoiber and could not, therefore, be recognized under the act of June 16, 1880, and that it then rejected the claim of Stoiber on the ground that the record showed that he had not paid the money. No other party but the said Edward G. Stoiber and the Colorado Anthracite Company could possibly have any right, legal or equitable, to the return of this money. The United States has no claim to it for the reason that the consideration for which it was received failed and that Congress by the act of June 15, 1880, has directed the repayment of the purchase money in all such cases. The Court of Claims holds that the appellee did have the right to the return of his money on the ground, as gathered from the decision of the court in the case of Edward G. Stoiber and from the findings in this case, that the appellee was in fact the party making the entry and as such the party contemplated by the act of June 16, 1880.

The first question, therefore, that arises for consideration is, was the Court of Claims correct in holding that the appellee was the party making the entry? It is submitted that there can be no question as to the correctness of the decision of the Court of Claims upon this point.

Finding 7, page 5 of the Record, states:

> "Following the said hearing, and before the Register and Receiver had rendered an opinion in

the case, they, on December 24, 1883, permitted the said Stoiber, through his attorney in fact, Theodore H. Thomas, to make such coal entry and issued coal certificate and receipt No. 13 thereupon and accepted from the said Thomas the sum of $3,200 in payment for the land. The money so paid was furnished by the Colorado Anthracite Company, who, prior to the said entry, had acquired a quit-claim deed therefor, as set forth in finding 13."

Finding 13, page 8 of the Record, shows that said Stoiber had given a quit-claim deed of this land on January 10, 1882, and that by mesne conveyances the land had been deeded to the Colorado Anthracite Company on February 15, 1882, and that there were no other deeds affecting the title of said Stoiber and said Company between February 15, 1882, and August 10, 1888. These two findings show, therefore, that Stoiber had conveyed any interest he might have had in this land on January 10, 1882, and that all his interest in the land belonged to the Colorado Anthracite Company at the time the entry was allowed and that the company furnished the $3,200 with which the entry was made.

The Court of Claims in the case of Edward G. Stoiber (41 C. C. 269) went behind the receipt given by the local officers, and held that Stoiber was not the person who made the entry by reason of the fact that he had not furnished the money and this decision became final by reason of the fact that it was accepted by the parties and no appeal was taken. Since Stoiber was not the person who made the entry the person making the entry could only have been the appellee. The Secretary of the Interior accepted the view that Stoiber was not the person who made the entry when it rejected his application for repayment by decision of January 14, 1902, upon this very ground.

So that the Department and the Court of Claims have both held that in such a case as this the facts can be inquired into to ascertain who it is who made the entry, and that a receipt given by the local officers is not conclusive and controlling to show who made the entry. There seems to be no reason for questioning the conclusion of the court in this respect.

The act of June 16, 1880, as construed by the Department, provides that repayment shall be made to the party who has suffered loss by the erroneous allowance of the entry. The act itself provides for repayment to the party making the entry or his heirs and assigns. The Department has construed the word "assigns" to mean one who has purchased the land subsequent to the allowance of the entry and prior to the cancellation and who has not been indemnified by the entryman for failure of title either by way of repayment of the money paid by the assignee or by the securing of another title. In other words, the Department has construed the word "assigns" equitably and not technically, so as in every case to make repayment to the party who has actually suffered loss. If the entryman had deeded the land, but has repaid the money he received from his grantee or has secured another title the entryman is entitled to the repayment notwithstanding that there might be technically an assignee. This construction, which has prevailed for many years, shows that the act of June 16, 1880, is regarded by the Department as providing for repayment to the person who has suffered the loss, and it was undoubtedly in pursuance of such construction that the Department rejected the application of Stoiber for the return of this money, for while the receipt technically showed him to be the entryman, the real party in interest and the person who made the entry and who suffered the loss was the appellee.

The Court of Claims rendered judgment upon the same theory and no reason whatever has been given by the brief upon this point in behalf of the appellant why such judgment should be disturbed. The appellee has been endeavoring to secure this repayment for nearly twelve years. The obligation of the Government to make the repayment has never been seriously disputed. Any possible claim in behalf of Stoiber has been concluded by the decision of the Department and the Court of Claims, and no reason whatever has been or can be brought forward why the repayment should not be made to the appellee, as the person who actually made the entry, who furnished the purchase money and who suffered the loss by the erroneous act of the local officers in receiving the money.

The Suggestion of Fraud.

Another question, however, is suggested by the brief for appellant on page 7 of the printed brief:

> "Whether or not the findings of fact and record in this case contain sufficient evidence to justify the court in holding that appellee was guilty of fraud in attempting to make the entry, and in the payment of the money now sought to be recovered."

This question is answered in the negative by the findings of fact as the record clearly shows that appellee was not guilty of any fraud in attempting to make this entry.

There was undoubtedly much confusion both in the minds of the local officers and of the appellee and of its attorney as to the proper construction of the coal land laws, but there was no fraud and no attempt at fraud. On the contrary every fact was disclosed to the local officers and they were left to decide as to the legal rights of the parties. The local officers did err, as is apparent, in allowing the entry to be made and in accepting the pay-

ment of the money at that time, and it is exactly this error on the part of the officers of the Government in receiving money which is the basis for this claim.

It should be noted that this entry was made in 1883, long before there were any decisions by this court upon the construction of the coal land laws and at a time when the Department itself was just beginning to rule upon the questions involved. It was evidently the theory of the parties in the present case, and it is shown by other cases to have been the theory of other parties, that every citizen had the right to enter 160 acres of coal land upon payment of the Government price; that the discovery of coal upon a tract gave the discoverer the preference right to enter the land and that he could make this entry in his own name even though he had practically parted with his rights before the actual making of the entry. It is shown by the record in this case that whether a party had the right to make such entry after having disposed of the right was the precise question involved in the contest or protest brought against the right of Stoiber to make this entry prior to the allowance of the same by the register and receiver.

In finding 11, page 8 of the Record, it is found:

> "The hearing had on September 28, 1883, before the local officers, the issue was to the right of Stoiber to make the entry. Buck had filed a protest against the right of Stoiber in the following terms: 'That the said Stoiber is not either personally or by agent in actual possession of the said land; that Stoiber has bargained, sold, and agreed to transfer all his right, title and interest in said land to the Colorado Anthracite Company or to some person in its behalf and for its benefit.'"

The finding then goes on to state:

> "The fact that Stoiber had bargained and sold and had already deeded his title or interest in the

land was admitted by the witnesses for Stoiber at this hearing in the testimony given by L. Kingsbury, Thomas J. Sterr, Samuel W. Harper and by Theodore H. Thomas, the attorney in fact for Stoiber, and none of the witnesses for Stoiber denied or concealed the fact that he had already deeded the land and that the entry was being made in the interests of the Colorado Anthracite Company.

The essence of fraud is deceit or concealment and when all of the facts of a case are stated just as they are without concealment, misrepresentation or equivocation, it is impossible for any person to state that he has been deceived or that the parties making such statements are in any way guilty of fraud or attempted fraud.

The charge of fraud in this case is not actually made by the appellant, but it is hinted at and suggested in the brief. On page 22 of the appellant's brief it is stated:

> "The *apparent* concealment of the fact that this entry was being made for the benefit of the appellee in the face of all the requirement necessary, as set forth in these statutes, is, to say the least, a strong indication that the company was not entitled or qualified to make the entry, and thereby a fraud was attempted to be perpetrated on the United States. This fraud, *if such it be*, was not disclosed to any Government official until the contest hearing between Stoibel and other claimants in the latter part of September, 1883; and then it was not disclosed by the company or any officer or any person authorized to speak for it."

Finding 11, page 8 of the Record, absolutely negatives this suggestion of fraud. The first opportunity for the facts to be revealed to the local officers was at this hearing in September, 1883, and at such hearing all the facts were disclosed and it was left to the local officers to decide what were the rights of the various parties upon

the facts disclosed at the hearing. Upon these facts the local officers decided in their opinion rendered in December, 1883, that the fact that Stoiber had deeded the land and that the improvements and possession had been the improvements and possession of the appellee and that an agreement had been made by Stoiber by which the said company was to acquire the land, did not prevent allowance of entry in his name. After considering all the evidence the local officers decided, as appears from the Record on page 7:

> "It also appears that Edward G. Stoiber and E. A. Buck have, since the filing of their respective declaratory statements, occupied and improved the land continuously, but as the filing of Stoiber was made prior to that of Buck, and as he has shown a compliance with the law, we have therefore allowed Edward G. Stoiber to enter under the coal land laws, the SE ¼ of the NW ¼, the NW ¼ of the SE ¼ and the W ½ of the NE ¼, Sec. 17, Tp. 13 S., R. 86 W., 6th P. M., without prejudice to any interest of Patrick's or Buck's."

In the light of the subsequent decisions of the Supreme Court and of the Department relative to the effect of the restriction of the right to enter coal lands to 160 acres, it is difficult to see how the register and receiver could have rendered such a decision and it was in fact overruled by the Commissioner of the General Land Office and the Secretary of the Interior. It should be noted, however, that this decision was rendered in December, 1883, and at this time these provisions of the coal land laws had not been passed upon by the Supreme Court and the decision of the Department which had just been rendered in a similar case had evidently not become known to the register and receiver.

A similar case decided by Secretary Teller October 25,

1883, and known as the case of *Kerr* v. *The Utah-Wyoming Improvement Company* (Vol. 2 P. L. D., 727) shows the theory which prevailed at this time regarding entries under the coal land laws and that the opinion of the register and receiver and of the appellee in this case was shared in by other persons. In that case Secretary Teller said:

> "SIR: I have considered the appeal of John W. Kerr *et al*, from your decision of August 20, 1883, denying their application to purchase and enter coal lands in Sec. 4, Tp. 13 N., R. 119 W., Wyoming. A case involving in part the same land was before me on appeal in December last, under the title of *John W. Kerr et al* v. *George W. Carleton*. As to Carleton's claim, it was contested on the ground that he had failed to comply with the law in the matter of occupancy and improvement; he on the other hand averring that he had through the Utah-Wyoming Improvement Company, acting as his agent, complied with the law in every particular. In deciding that case, on the 11th of December last, I took occasion to say, in substance, that from the agreement and contract between Carleton and the Utah-Wyoming Company, together with the collateral evidence relating thereto, it quite clearly appeared not only that the relation of principal and agent did not exist, but that as a matter of fact the evident purpose and effect of the contract was, as between the parties, a complete transfer by Carleton to the Company of his prospective as well as his then existing rights in the lands claimed under his coal declaratory statement. All the facts, including the acts of Carleton and the Company respectively, warranted this conclusion.
>
> "As between Carleton and the Government, however, he, for the purpose of formally completing the transfer to the company under the contract by passing to it a fee-simple title to the land, still claimed in his own name, and asked that patent be issued to him."

It will be noted that the situation revealed by this quotation is exactly the situation in the present case. Stoiber had parted with his right, but it was evidently considered that for the purpose of completing the transfer to the company under the contract or agreement which he had made with them he was entitled to have the patent issued to him. Secretary Teller then goes on to say:

> "Having concluded that the relation between him and the company was that of assignor and assignee and not that of principal and agent, and that he had not continued to occupy and improve the land either in person or by agent in such a sense as to justify the issuance to him of patent, I decided that since the weight of evidence showed that he was in contemplation of the law the first of the parties in contest to make settlement and improvement as a coal land claimant, the company should be permitted to prove up and purchase as assignee of Carleton provided it could show its right to do so.
>
> "The Company applied to purchase as such assignee, and on the 16th of January last the register and receiver allowed the entry.
>
> "Kerr and Fowler, former contestants, also applied on the 5th of January last to purchase and enter the lands covered by their respective claims.
>
> "Their application was rejected by the local officers, which action was affirmed by you on the ground that Carleton's filing was not canceled by departmental decision of December 11th, the finding in that decision being that the company occupied the position of assignee of Carleton, and the effect being to put said company in his place so that by virtue of the assignment it succeeded to all the rights which he had under his filing.
>
> "In other words, Carleton's filing being still *in esse*, and having inured with all his rights thereunder to his assignee, was an appropriation of the lands covered thereby, and consequently the applications of Kerr and Fowler could not be allowed.

"You thereupon dismissed their appeal and in this your action was undoubtedly correct. * * *

"Said entry is opposed and objected to by Kerr *et al* on two grounds principally, to wit: First, that the Utah-Wyoming Company has not shown its right to purchase as assignee of Carleton; and second, that it is not qualified under the law to make the purchase and receive patent.

"As to the first objection, as already indicated (*supra*), I decided on the 11th of December last, after a careful consideration of all the facts then before me, that to all intents and purposes the transaction between Carleton and the company under the agreement and contract of December 20, 1881, amounted to and was in effect a present disposal and assignment of all interests which he (Carleton) had or expected to have in the land covered by his coal declaratory statement.

"The condition imposed by my former decision, to the effect that the company will be permitted to prove up and purchase if it can show its right as assignee so to do, must, therefore, have reference to the qualifications under the law of the individual members of the company. * * *

"I am clearly of the opinion that if at the date of entry no single member of a company which applied to make the entry is disqualified by reason of interest in any other land claimed or owned under the coal law, such entry, if there be no other objection, must be regarded as valid and patent should issue. Your decision on this point is, therefore, affirmed."

The decision quoted was not rendered until October 25, 1883, and had evidently not been communicated to the local office at Gunnison at the time they rendered their decision of December 28, 1883, for the action of the local officers is directly contrary to this decision. What they should have done was to hold that the appellee was the assignee of Stoiber and had the right to enter the land in its own name as such assignee provided it could

show that it was properly qualified under the coal land laws. But even then the entry itself should not have been allowed at that time because of the fact that the pretestants and adverse claimants had the right of appeal, and it was and still is the rule and practice that no entry should be allowed or accepted pending the right of appeal. Had the local officers not erred this entry would not have been allowed at the time and the appellee would not have paid the money which it is now seeking to recover, and it is for exactly such a case that the act of June 16, 1880, provides the remedy of repayment.

The record shows, therefore, that so far from there being any fraud or attempted fraud in this case the parties interested disclosed to the register and receiver all the facts in the case and that the register and receiver erred in their view of the law and erroneously allowed the entry to be made. No single fact was concealed and no misrepresentation made and the local officers were in no way deceived and under no misapprehension when they allowed the entry to be made. Not only is this shown by the record, but it is shown by the action of the Commissioner and of the Secretary in cancelling the entry for the entry was canceled not on the ground that the statements made at the hearing had been shown to be false, but upon the ground that the record showed it should not have been allowed.

The claim is made in the brief for appellant that the appellee has not shown that it was qualified to make this entry and that, therefore, it may be presumed that it was not so entitled. In reply it is sufficient to state that the company has never been called upon or asked or even allowed to show that it was entitled to enter this land in its own name. The case was decided by the local officers upon the theory that Stoiber by virtue of his discovery was entitled to enter the land in his own name and the

entry was canceled by the Commissioner of the General Land Office and by the Secretary of the Interior upon the ground that the record showed that Stoiber was not entitled to enter. Had the Department taken the same action in this case that it took in the case of *Kerr* v. *The Utah-Wyoming Company* it would have directed that the company be allowed to show that it was entitled to enter this land, but for some reason, not now appearing, the case was decided on the record already made and no opportunity was given the company to show that it was qualified to enter. The entry was made in December, 1883, and was not canceled until August 10, 1888, having been pending in the Department for nearly five years. Neither in the action of the Department upon claims for repayment or in the Court of Claims was it alleged as in any way essential to the maintenance of this claim for the appellee to show that it was qualified to make this entry in its own name and the point is raised for the first time in the brief for appellant in this court. There is nothing in the repayment law making it necessary to make such allegation and the fact that it was not made has no bearing whatever upon the case. Such fact would be material of course if the appellee was endeavoring to obtain title to the land at the present time and title could not be obtained without making such proof, but there is no obligation in a claim for repayment to make such allegation and the fact that the record is silent upon this point has no bearing upon the rights of the appellee to the return of the purchase money.

As stated there was an erroneous idea on the part of the attorney for the appellee and probably on the part of Stoiber and of the appellee as to the meaning and effect of the coal land laws, but there was no fraud or attempt at fraud; on the contrary the utmost good faith was shown. It appears that the Colorado Anthracite Com-

pany whose post-office address was the city of Philadelphia, and whose stockholders were presumably of that city, undertook to develop and obtain title to what was supposed to be anthracite coal lands in the State of Colorado; that Edward G. Stoiber, a prospector, discovered coal lands in Gunnison County, Colorado, and that by reason of such discovery, supposed that he had the right not only to obtain title to such land, but to deed the land and to make his deed good by obtaining patent to the land in his own name; that before the allowance of the entry every detail of this arrangement was revealed and made plain to the local officers before whom this very point was in issue. There is, therefore, no justification whatever in this case for the allegation or the inference that fraud was attempted by any of the parties to this transaction. There can not be any fraud when all the facts are made known.

There was in this case just one affidavit which by itself was not strictly true according to the actual interpretation of the coal land law. This affidavit was made by Theodore H. Thomas as attorney in fact for Edward G. Stoiber, and is referred to in Finding 6, page 5 of the Record. Mr. Thomas was the attorney for the company as well as attorney in fact for Edward G. Stoiber and executed an affidavit on the 14th of August, 1883, which seems to have been filed in the local office on October 1, 1883, which was probably before the conclusion of the hearing. It purported to state that Stoiber was in possession of the land and was making the entry for his own use and benefit and not directly or indirectly for the use or benefit of any other party. In reference to this affidavit it is only necessary to say that Mr. Thomas, as well as all the witnesses for Stoiber at the hearing, stated, as shown by finding 11, page 8 of Record, that *Stoiber had bargained and sold and already*

deeded his interest in the land and *that none of the witnesses for Stoiber denied or concealed the fact that he had already deeded the land and that the entry was being made in the interest of the Colorado Anthracite Company.* The said affidavit was, therefore, evidently made upon the theory that the statements were correct in law and they were duly explained by all of the parties at the hearing. Moreover, Thomas as attorney in fact had no right to make this affidavit as the rules provided that such final affidavit should be made by the entryman himself, and being made by Thomas was of no effect whatever.

In the case of J. W. Hallowell (2 L. D. 725) the Commissioner of the General Land Office wrote to the register and receiver at Leadville, Colorado, on May 29, 1884, as follows:

> "GENTLEMEN: In the matter of coal entry No. 31, Ute series, made February 28, 1883, in the name of J. W. Hallowell, the declaratory statement and affidavit required at the time of actual purchase were made by H. F. Smith, attorney in fact for Hallowell.
>
> "The regulations under the coal land law, approved July 31, 1882, require these, the declaratory statement and affidavit, to be made by the applicant himself. The claimant may, however, after making his application, or declaratory statement and affidavit required at the time of actual purchase, as the case might be, empower an agent to do certain acts, and certain proofs may be made by an agent or facts established in accordance with ordinary rules of evidence, but these are specifically provided for in paragraphs 34, 35, and 36 of said regulations.
>
> "In this case, though, as no conflict or adverse filing appears of record, the claimant will be allowed to make his declaratory statement and affidavit as above indicated *nunc pro tunc.*"

The regulations, therefore, provided that this affidavit which was made by Thomas should have been made on

the date of the allowance of the entry by the claimant himself, and having been made by an agent was of no force or effect whatever. The same party who made this affidavit explained at the hearing exactly what the facts were and this statement was evidently considered by him to be consistent with the sale of the land to the appellee and was evidently due to an erroneous belief as to the coal land law similar to that shown in the case of *Kerr* v. *The Utah Wyoming Company.*

Even if a false statement is found in the proof if, before the entry is allowed, all the facts are disclosed by the record there is no justification for retaining the purchase money. Such a case was that of Henry Wagoner (37 P. L. D. 580) in which the claim for repayment was allowed. In that case it appears from the statement in the decision:

> " He also testified that he had made no agreement by which any person was to receive any portion of the land, but he admitted that he had bought out all the adverse claimants, giving his note to each of them for $4,000. After the final proof was submitted a withdrawal of the contest dated March 10th was filed with the local officers, and upon the proof submitted by claimant the entry was allowed and the purchase money was received and transmitted to the Secretary of the Interior.
>
> " While the case was pending before your office the contest was renewed and a hearing ordered thereon. Upon the testimony offered at said hearing your office found that Wagoner did not take the land with a view to making it his home but for speculative purposes; which finding was affirmed by the decision of the Department February 17, 1896, and the entry of Wagoner was canceled.
>
> " The question presented by the application is whether the commuted entry was erroneously allowed by the local officers. It is true that Wagoner in his final proof therein testified that he had made no

contract or agreement by which others were to be interested with him in the entry, and that upon the second hearing it was disclosed that the settlements made with the adverse claimants were in the nature of a compromise by which they were to be interested in the land, but the final proof showed that in one or two weeks after his settlement and about four months prior to the date of homestead entry he had formed the intention to take the land for townsite purposes, and before any filing or entry had been made the land had been platted into blocks, lots streets and alleys, which was fully disclosed by the final proof upon which the commuted entry was allowed. * * *

"Upon the face of the record the commuted entry was erroneously allowed. Although it was the intention of the claimant at the time of his settlement to take the land for the purpose of actual settlement and cultivation, yet if it appears that at the date of his homestead entry he had formed an intention to enter the land for townsite purposes, such an entry would not be within the intent and purpose of the homestead law, and if such purpose was disclosed by the final proof submitted upon the application to commute the local officers should have rejected the same and refused to allow the commuted entry. The acceptance of the money and the issuance of final certificate by the local officers upon such proof was erroneous, and the claimant is entitled to repayment.

"The application is, therefore, allowed."

The Department in the case just cited holds that where all the facts are disclosed to the local officers prior to the allowance of the entry and if such facts show as a whole that the entry should not have been allowed, the entry is erroneously allowed and repayment is due. In the case cited the entry was canceled because made for speculative purposes which under the statute relating to such entries would involve the forfeiture of the purchase money, and yet because the entryman plainly indicated the facts at

the time the proof was made the Department held that the local officers erred and that the entryman was entitled to repayment of the money which was paid through such error.

The assumptions and arguments in the brief for appellant are, therefore, controverted by the decisions of the Department itself. Upon the question as to the proper party to whom repayment should be made and the facts which require repayment to be made the Department itself has held, as shown by the cases cited in this brief, in exact accordance with the decision of the Court of Claims and there is no reason for disturbing the judgment of that court.

Respectfully submitted,

E. W. SPALDING,

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